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STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



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COMMISSIONER

October 2, 2013

Mr. Curtis Spalding  
Regional Administrator  
EPA Region I  
5 Post Office Square, Suite 100  
Boston, MA 02109

Re: Maine Department of Environmental Protection's Opposition to the *Petition for a Determination that Stormwater Discharges from Commercial, Industrial, and Institutional Sites Contribute to Water Quality Standards Violations and Require Clean Water Act Permits*

I am submitting this letter to EPA on behalf of the Maine Department of Environmental Protection in strong opposition to the *Petition for a Determination that Stormwater Discharges from Commercial, Industrial, and Institutional Sites Contribute to Water Quality Standards Violations and Require Clean Water Act Permits* submitted by American Rivers, Conservation Law Foundation and Natural Resources Defense Council on July 10, 2013. This overreach for authority requested by the petitioners, if granted, would likely have the harmful impact of stymying the progressive efforts of individuals, municipalities, groups and DEP throughout the state of Maine. The issues discussed in the petition are being effectively addressed at the watershed level and years of collaborative efforts by DEP, the municipalities and the stakeholders in the watersheds. To impose MEPDES individual permits in the face of these efforts in any watershed would create a disincentive for property owners in MS4 communities throughout the state to work collaboratively to improve the watershed.

**I. Maine Has a Strong and Effective Series of Programs Which are Addressing Urban Runoff**

**A. Maine has layers of programs, both regulatory- and assistance-based which collectively prevent and minimize stormwater pollution.**

Protection of Maine's watershed is paramount to ensuring that Maine's rivers and lakes remain a precious natural resource. Great strides have been taken toward the goal that all watersheds, even those in Maine's more urban communities, reach the

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highest water quality attainable. Maine works toward reaching that goal through a series of regulatory and assistance-based programs. Point sources are regulated through MEPDES permits. These permits include MS4 permits issued to municipalities and institutions, as well as Multisector General Permits issued for industrial activities pursuant to the MEPDES program. Licenses issued under these programs are issued pursuant to the EPA-approved MEPDES program.

Stormwater is also addressed through the Site Location of Development Law and Maine's Stormwater Management Law. For example, projects disturbing one or more acres require approval from the Department, and must comply with stormwater quality and quantity standards. See 38 MRSA § 420-D and 06-096 CMR 500, 502. These stormwater requirements are specifically intended to prevent pollution of greater than *de minimis* levels from being discharged into waters of the State. This is described in the "Introduction" section of MEDEP's stormwater rule:

Land use activities can cause changes in stormwater flows. Many pollutants, such as nutrients and metals, attach to fine particles of soil from throughout the watershed. Soil and attached pollutants are carried in the stormwater down to a waterbody or wetland. A project is required to meet appropriate standards to prevent and control the release of pollutants to waterbodies, wetlands, and groundwater, and reduce impacts associated with increases and changes in flow.

*06-096 CMR 500 (1)*

Development of 20,000 square feet or more of impervious area or 5 acres or more of developed area, in watersheds identified as urban impaired streams listed in 06-096 CMR 502, and development of one acre or more of impervious area or 5 acres or more of developed area in any other stream, coastal, or wetland watershed must meet specific stormwater standards.

In addition to the MEPDES and stormwater programs described above, which are regulatory in nature, DEP's Watershed Management Program undertakes many additional initiatives to work with property owners to implement practices of watershed protection. The Watershed Management Program works with lake associations, provides certification to contractors working within the shoreland zone, and engages in numerous educational efforts to protect Maine's watersheds.



**B. Maine's stormwater programs continue to be successful due to active involvement from Maine's residents, businesses and municipalities.**

Through the layers of regulation and education and assistance, MEDEP has been working with communities and property owners on a watershed level to address urban runoff. Watershed Management Plans have been developed and are being implemented in many areas throughout the state, and more continue to be developed and improved. New MS4 permits were recently issued in June of 2013, and require implementation of additional measures to address stormwater runoff in those communities. The success of the efforts of the MS4 communities relies heavily upon active participation and efforts of the individual property owners.

Funding for efforts within and outside of the MS4 communities comes from various sources. Some communities have established stormwater utility districts to implement permit requirements. In other instances, infrastructure measures, retrofits and development of watershed management plans were possible due to receipt of Section 319 grant funding. By working with communities on a watershed-based approach, DEP has assisted in long-term planning in a way that prioritizes measures which will have the most effective impact on improving water quality of impaired waterbodies.

The communities and property owners have stepped up and are making great strides toward addressing urban runoff on a watershed-by-watershed basis. To require property owners to obtain individual MEPDES permits in the face of such efforts is an unreasonable penalty and would discourage many property owners from taking proactive strides to contribute to watershed management efforts.

**II. The Request Does Not Align with the Purpose of Residual Designation Authority and Reaches Beyond Sources Which Significantly Contribute to Urbanized Pollution**

**A. The petition requests designation for sources that are subject to regulatory control and fall into predetermined categories.**

The purpose of Residual Designation Authority is to address a situation where "individual instances of storm water discharge might warrant special regulatory attention, but do not fall neatly into a discrete, predetermined category." See 64 Fed. Reg. at 68,781. Reading 40 C.F.R. §122.26(a)(9)(i)(D) in the context of 40 C.F.R. §122.26(a)(9)(i), the intention of subsection D is to capture those sources not already subject to regulatory control from permits under subsections A, B or C. Commercial,

industrial and institutional sites are all predetermined sources of stormwater and if they are likely to be significant contributors of stormwater pollutants, they would be regulated under permits pursuant to Maine's Site Location of Development Act, stormwater law, or waste discharge law. Even if a development does not satisfy requirements sufficient to warrant a separate permit (for example, if the site does not trigger the impervious cover or developed area thresholds), if the site is likely to significantly contribute pollutants to an impaired waterbody in an urbanized area, it would be subject to regulatory controls imposed upon the MS4 community.

Instead of utilizing RDA to address an individual instance where a stormwater source has fallen through the regulatory cracks, the petition makes a broad-reaching request that ignores the original case-by-case and "special" scenario related to a "discrete" source contemplated by the RDA clause. Petitioners instead discuss a generalized urban pollution principle, which is already being addressed in Maine by efforts previously discussed in this letter. Petitioners also allude to requiring stormwater permits to address urbanized pollution for development outside of urbanized areas. The Petitioners provided no evidence that individual discrete elements of impervious cover that are small enough in size to be unregulated by the existing stormwater programs, and in non-urban areas, contribute more than *de minimis* amounts of pollutants to any waterbody. Absent this demonstration, these developments do not warrant "special regulatory attention."

Although there are instances where designations can be "geographically broad," a multiple-state geographic designation only makes sense if a discrete issue were identified within that geographically broad region. In this instance, the geographically broad request is coupled with a vague and functionally broad pollution source. The result of such a request is that it is too broad and too vague to act upon.

**B. The premise of the request is to address urban runoff, yet most of the waterbodies identified in Maine are not "urban impaired" and sites likely to be contributors of waterbody impairment are currently regulated.**

The stormwater regulations were developed to regulate those sites which are significant contributors of pollutants. This determination was made taking into consideration the size of the development, the amount of impervious cover, the location of the impervious cover in relation to other development and waterbodies. Determination of whether a development is a significant contributor also must take into account the design of the site to address stormwater runoff, the size and characteristics of a receiving waterbody, the nature and character of the surrounding topography and



Best Management Practices used. This information is necessary to determine whether the pollution contribution from a small commercial building and small parking lot in a rural area is more than *de minimis*. The petition also does not take into account that contribution of nutrients of a small development in a rural area may be *de minimis* and that impairment may be due to other factors not related to runoff from impervious cover.

Although the focus in the petition of the justification for designation was urban runoff and impervious cover, not all of the waterbodies were listed for urban runoff parameters. The petition listed 156 waterbodies from Maine. Many waterbodies were listed multiple times for different parameters. When eliminating the duplications from the list the resulting list consists of 96 waterbodies. Of those 96, most of the waterbodies are located in rural areas of the state, where stormwater runoff from unregulated properties is likely to only be a *de minimis* contribution to impairment. For those waterbodies which are located in urbanized areas or cities, subject development is regulated through the use of MS4 permits, or stormwater permits. Therefore, of the 156 waterbodies presented in the petition, none fit the jurisdictional criteria related to Residual Designation Authority over discharges from commercial, industrial and institutional sites.

### **III. Conclusion**

Maine regulates stormwater discharge through many programs. Any development likely to be a (non- *de minimis*) contributor to urbanized stormwater runoff is already captured by Maine's existing regulations. Municipalities and the owners of businesses and institutions have responded responsibly, and have developed a watershed approach to taking measures to eliminate impairment. Significant resources have been invested in planning and implementation of watershed management.

The success of each program relies on the need for active participation by those located in the communities and the flexibility to utilize whatever tools are appropriate for each individual watershed. If the petition is granted, it would likely have the harmful impact of stymying the progressive efforts of individuals, municipalities, businesses, groups and DEP throughout the state of Maine. To impose MEPDES individual permits in the face of these efforts in any watershed would create a disincentive for property owners in MS4 communities throughout the state to work collaboratively to improve the watershed.

Residual Designation Authority is an important regulatory tool that should be utilized in instances where appropriate action is not being taken to control stormwater runoff that is contributing to the impairment of a waterbody. It is a tool that is intended to

Letter to Mr. Curtis Spalding  
Regional Administrator, EPA Region I  
October 2, 2013  
Page 6 of 6

regulate a discrete source of pollution that would otherwise remain unregulated, and which was not contemplated at the time of identifying sources. This is evidenced by not only the explanation in the Federal Register, but also by the short timeframe given to EPA for a response to a petition. The petition before EPA is so broad and vague, EPA cannot reasonably act on the petition, and therefore must deny the petitioners' request.

Respectfully Submitted,



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